

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2021/00357

In the matter between:

RUSSELL KWIZERA

APPLICANT

and

**MINISTER OF HOME AFFAIRS, IMMIGRATION,
SAFETY AND SECURITY**

RESPONDENT

Neutral citation: *Kwizera v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-MOT-GEN-2021/00357) [2023] NAHCMD 311 (8 June 2023)

Coram: USIKU J

Heard: 16 February 2022

Delivered: 12 June 2023

Flynote: Citizenship – Article 4 (1)(d) of the Constitution of the Republic of Namibia – Applicant alleging that he is a Namibian citizen by birth on account that his parents were ordinarily resident in Namibia at the time of his birth – Requirements – Court finding that the applicant has not established that his parents were ordinarily resident in Namibia at the time of his birth – Court further finding that parents who are in Namibia awaiting the outcome of their application for refugee status are not

'ordinarily resident' in Namibia for the purposes set out in article 4(1)(d) of the Constitution – Applicant's application for an order declaring him a citizen by birth, dismissed.

Summary: The applicant was born in Otjiwarongo, Namibia. His parents came to Namibia in 2000 and applied for refugee status. At the time of the applicant's birth, his parents had not yet acquired refugee status but were still awaiting the outcome of their application.

Held: the applicant's parents were not 'ordinarily resident' in Namibia at the time of the applicant's birth, therefore the applicant never acquired Namibian citizenship by birth.

Held further that since the applicant is not entitled to Namibian citizenship by birth, the decision to issue him with a full birth certificate on 28 May 2002 is reviewed and set aside and the full birth certificate and the national identification card issued pursuant thereto are revoked.

ORDER

1. The applicant's application is dismissed.
 2. It is declared that parents who are in Namibia awaiting the outcome of their application for refugee status and who, at the time of the birth of their child have not obtained refugee status, are not 'ordinarily resident' in Namibia for the purposes of art 4(1)(d) of the Constitution.
 3. The decision to issue the applicant a full birth certificate on 28 May 2002 is hereby reviewed and set aside and the full birth certificate and the national identification card issued pursuant thereto are hereby revoked.
 4. The applicant is ordered to pay the costs of the respondent occasioned by the application and the counter application, such costs to include costs of one instructing and two instructed counsel.
 5. The matter is removed from the roll and is regarded finalised.
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JUDGMENT

USIKU J:

Introduction

[1] This matter concerns a question whether a child born in Namibia of parents who are not Namibian citizens, who entered Namibia as asylum seekers, and who at the time of the child's birth had not yet obtained refugee status, is entitled to Namibian citizenship by birth in terms of art 4(1)(d) of the Namibian Constitution, ('the Constitution').

[2] In this matter, the applicant Russel Kwizera, seeks an order:

- (a) declaring him to be a Namibian citizen by birth as envisaged by art 4(1)(d) of the Constitution;
- (b) directing the respondent to, within 30 days from the date of this order, issue him with a Namibian passport, and,
- (c) costs of suit.

[3] The respondent, the Minister of Home Affairs, Immigration, Safety and Security, opposes the application. In turn, the respondent launched a counter application in which he seeks an order:

- (a) declaring that an asylum seeker is not an ordinarily resident of Namibia and a child born in Namibia to an asylum seeker shall not be a Namibian citizen by birth as envisaged in art 4(1)(d) of the Constitution,
- (b) declaring that a decision to issue the applicant a full birth certificate on 28 May 2002 is reviewed and set aside and the full birth certificate and the national identification card issued pursuant thereto are revoked, and,
- (c) costs of suit.

[4] The applicant opposes the counter application.

Background

[5] The parents of the applicant are nationals of Burundi. In 1996 they fled Burundi as a result of an internal inter-ethnic conflict. They passed through Tanzania and Zambia and arrived in Namibia on 11 October 2000.

[6] On 16 October 2000, at Osire Camp in Namibia, they applied for refugee status in accordance with the provisions of the Namibia Refugees (Recognition and Control) Act 2 of 1999, ('the Refugees Act').

[7] On 27 March 2002, the applicant was born at Otjiwarongo, in Namibia. On 28 May 2002, the applicant, (through his parents) was issued with a Namibian 'confirmation of birth'. On that document the details of the applicant's father were initially entered that he is 'Namibian', which is crossed out and 'Burundi' is entered.

[8] Also on 28 May 2002, the applicant was issued with a full birth certificate, which records that his father's place of birth is Bugenyizi, but the country is indicated as Namibia.

[9] During March 2004 the applicant's father applied to be resettled to Canada with his family (including the applicant). During June 2005, applicant's father was granted permission to resettle to Canada and was approved to be furnished, (together with his family), with United Nations travel documents. However, applicant's father and his family did not travel to Canada.

[10] On 4 September 2006 the Namibia Refugees Committee approved the application of the applicant's father for refugee status in Namibia and requested him to present himself to the Camp Administrator at Osire Camp to apply for a refugee identity card.

[11] When the applicant reached 16 years old in 2018, he applied for a Namibian identity card which was issued to him on 24 October 2018.

[12] In 2021, the applicant was informed that his school had organized a school trip to South Africa, which he intended to attend. The applicant applied for a Namibian

passport on 15 April 2021. His application was rejected on the ground that he is not a Namibian citizen as he is born of parents who are refugees in Namibia.

[13] Dissatisfied with the response received from the Ministry of Home Affairs, the applicant sought legal advice and thereafter, instructed his attorneys of record to re-apply for a Namibian passport on his behalf. The second application was submitted on 20 April 2021. There was no immediate response to the second application despite a follow-up on 29 April 2021. However, on 3 May 2021, the applicant's attorneys were informed by the Executive Director of the Ministry that the applicant is not entitled to a Namibian passport as he is not a Namibian citizen.

[14] On 12 May 2021, the attorneys representing the Ministry addressed a letter to the applicant's attorneys expressing readiness to issue the applicant an emergency travel document that is valid for 12 months and recording that the applicant's attorneys were informed at the meeting of 3 May 2021 that the Ministry was investigating how the applicant obtained Namibian citizenship.

[15] On 17 May 2021, the applicant's attorney responded to the attorneys of the Ministry to the effect that the applicant is a Namibian citizen by birth and that he is ready to accept to be issued with a Namibian travel document valid for 12 months and will not accept a refugee passport.

[16] There being no consensus between the parties on the issue in dispute, the applicant launched the present application on 9 September 2021.

Applicant's application

[17] The applicant argues that he is a Namibian citizen by birth, by virtue of the provisions of art 4(1)(d) of the Constitution in that:

- (a) at the time of his birth, his parents were ordinarily resident in Namibia, and that,
- (b) his parents are not persons falling within the categories of person mentioned in the *proviso* to art 4(1)(d),

[18] The applicant also contends that he is a Namibian citizen in that:

- (a) he was issued with a Namibia full birth certificate and a Namibian national identity card reflecting that he is a Namibian citizen,
- (b) from the time of his birth he only had one status for his presence in Namibia, namely as a citizen,
- (c) he has lived his entire life in Namibia and regards Namibia his only home, and that,
- (d) taking away his citizenship by birth will render him a stateless person, as he is not willing to apply for citizenship by descent.

[19] The applicant's father has deposed to a confirmatory affidavit in which he states that:

- (a) he has read the founding affidavit of the applicant and confirms as true and correct all references therein, as the biological father of the applicant, and that,
- (b) he specifically confirms that the applicant was born in Namibia on 27 March 2002 and that at the time the applicant was born, he and his wife were lawfully living and residing in Namibia.

[20] The applicant therefore, seeks the relief as set out in the Notice of Motion.

Respondent's position

[21] The respondent disputes that the applicant is a Namibian citizen as envisaged in art 4(1)(a) in that his parents were not ordinarily resident in Namibia at the time of his birth. His parents were asylum seekers residing at Osire refugee camp and their application for refugee status was still pending. The respondent avers that, at that point it cannot be said that applicant's parents had no intention to permanently depart from Namibia nor could it be said that they had the intention to make Namibia their habitual home.

[22] The respondent avers further that every person applying for a Namibian passport goes through a verification process. The same was done for the applicant. It

was during that verification process that it was discovered that although the applicant was in possession of Namibian identification documents indicating that he is a Namibian citizen, both his parents are not Namibian nor were they ordinarily resident at the time of the applicant's birth.

[23] One will note, asserts respondent, that on the copy of the 'notification of birth' the details of the applicant's father were first entered that he is 'Namibian', which was crossed out and 'Burundi' was entered. The respondent avers that it is not clear whether the correction was made on the day of completing the documents or it was done at a later stage. The respondent further asserts that the full birth certificate records that the place of the birth of applicant's father is Bugenyuzi, which is a place in Burundi, but the country is reflected as Namibia. On consideration of the applicant's birth certificate, the details of the father read that the father is 'Namibian'. The respondent avers that, the birth certificate issued to the applicant and the subsequent identification card, were issued on wrong information and misstatement of facts and were therefore, issued erroneously and are liable to be revoked.

[24] On the issue of the residence status of the applicant, the respondent submits that, from the period of the applicant's birth to when he turned 18 years of age, in 2020, he was regarded as a family member of his father in terms of s 17 of the Refugees Act, as his father is a recognized refugee. There was no need, so submits the respondent, for the applicant to independently apply for refugee status. However, he is entitled under s17 of the Act to apply for refugee status if he so wishes.

[25] In regard to the applicant's contention that he will be rendered stateless if it is found that he is not a Namibian citizen by birth, the respondent submits that applicant will not be rendered stateless as he may acquire citizenship by registration or naturalisation as contemplated in art 4(3) and (5) of the Constitution. The respondent asserts further that, since he is born of Burundian parents, he is a citizen of Burundi.

[26] The respondent submits that the decision to reject applicant's passport application was reasonable in the circumstances and that the applicant's application be dismissed.

Respondent's counter application

[27] In his counter application the respondent states that the relief he seeks is necessitated by the nature and basis of the relief sought by the applicant. The order sought by the applicant, asserts the respondent, raises the question whether a child born in Namibia to asylum seekers acquires citizenship at birth. The respondent argues that the effect of the relief sought by the applicant effectively means that every child born of an asylum seeker automatically acquires Namibian citizenship by birth. The respondent contends that what the applicant seeks is not compatible with the provisions of art 4(1)(d).

[28] In regard to the identification documents issued, the respondent states that those documents are liable to be revoked as they were issued under wrong information and misstatement of material facts. The applicant's birth notification recorded that his father was Namibian at the time of birth. The respondent states that such wrong information was used to issue the full birth certificate to the applicant and the subsequent identification card. The respondent therefore, submits that the identification documents be revoked as they were issued erroneously.

Applicant's position

[29] The applicant contends that he is entitled to Namibian citizenship because he was born in Namibia to parents who were ordinarily resident in Namibia. He asserts that, children born of parents who are asylum seekers do not form part of the list of persons excluded from acquiring Namibian citizenship by birth under art 4(1)(d).

[30] In regard to the issue of identification documents, the applicant submits that there is no evidence that his birth certificate and identification card were issued on the basis of wrong information. He avers that, his father did not submit any wrong information. The applicant asserts that it was the respondent's officials who filled in the details in the relevant forms. He submits that the identification documents are valid and should not be revoked.

Analysis

[31] The principal issue for determination is whether or not the applicant is entitled, in terms of art 4(1)(d) to Namibian citizenship by birth. If he is so entitled, then it follows that he is entitled to be issued with Namibian identification documents. On the other hand, if he is not so entitled, then he has no claim to Namibian identification documents.

[32] The relevant provisions of art 4(1)(d) read as follows:

'(1) The following person shall be citizens of Namibia by birth:

(a) ...

(b) ...

(c) ...

(d) those born in Namibia after the date of Independence who do not qualify for citizenship under Sub-Article (c) hereof, and whose fathers or mothers are ordinarily resident in Namibia at the time of the birth of such persons: provided that their fathers or mothers are not then persons:

(aa) enjoying diplomatic immunity in Namibia under any law relating to diplomatic privileges; or

(bb) who are career representatives of another country; or

(cc) who are members of any police, military or security unit seconded for service within Namibia by the Government of another country; or

(dd) who are illegal immigrants:

provided further that Sub-Articles (aa), (bb), (cc) and (dd) hereof will not apply to children who would otherwise be stateless.'

[33] The main question arising from the provisions of art 4(1)(d) is whether the applicant's parents were 'ordinarily resident in Namibia' at the time of his birth.

[34] The term 'ordinarily resident' was interpreted in *MW v Minister of Home Affairs*¹ as follows:

[70] In determining whether or not a person is ordinarily resident as contemplated by art 4(1)(d), each case must be considered on its facts. As Ramsbottom J observed in *Biro v Minister of the Interior* 1957 (1) SA 234 (T) (at 239H), the phrase ordinarily resident is not a technical expression - it must be interpreted in the context in which it is used. Key considerations will include whether the person concerned normally lives in Namibia, and is

¹ *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC) at para 70.

therefore not merely visiting Namibia, and whether the person has no immediate intention of permanent departure. Moreover, proof of ordinary residence will require more than a person's mere say-so. The intention to make Namibia one's habitual home must be established by facts which are capable of objective proof. Evidence will thus need to be led to show that the person is indeed normally resident in Namibia. Such evidence will include the person's place of residence, the period of residence in Namibia, as well as his or her livelihood, and other relevant factors.'

[35] In the present matter, it is common cause that the applicant was born at Otjiwarongo, in Namibia. At the time of his birth his parents had been residents in Namibia for a period of one year and five months. Furthermore, at the time of his birth the refugee status of his parents had not yet been decided upon.

[36] On the facts of the present matter, it appears to me that the primary reason for the presence of the applicant's parents in Namibia, at the time of his birth, was to wait for the outcome of their application for refugee status. At that time, the outcome could result either in the approval or rejection of the application for refugee status.

[37] In my opinion, being in Namibia awaiting the outcome of an application for refugee status bestows only a right to remain temporarily in the country. If such application is refused, the applicant loses the protection granted by that temporary right and he or she shall be subject to the laws governing deportation of unlawful entrants.

[38] The term 'ordinarily resident' in art 4(1)(d), in my view, is used in the context of parents who enjoy full legal protection to remain in Namibia. It does not include parents who only have the right to remain in Namibia pending the outcome of their application for refugee status. That is because of the nature of the right normally conferred to a refugee, namely, to enter the country, apply for refugee status and await the outcome of the application. The right to remain in the country between the period of the submission of the application and the receipt of the outcome, is a temporary right in nature. The full legal protection to remain in the country arises only when the application is successful.

[39] I am of the view that it cannot be said, in the present matter, that applicant's parents were 'ordinarily resident' in Namibia at the time of his birth and therefore, the applicant never acquired Namibian citizenship at birth, as contemplated in art 4(1)(d).

[40] Having come to the conclusion that the applicant is not a Namibian citizen by birth, it follows that the applicant is not entitled to the Namibian identification documents and that those which were issued to him should therefore, be revoked.

[41] In regard to the issue of whether or not the applicant would be rendered 'stateless' if it is found that he is not a Namibian citizen by birth, I am not persuaded that the applicant is thereby rendered stateless. The applicant retains his Burundian citizenship by descent. In any case, he is entitled to apply for Namibian citizenship, if he is so inclined.

[42] In his counter application, the respondent seeks a declaratory relief in the following terms:

'Declaring that an Asylum seeker is not an ordinary resident of Namibia and a child born in Namibia to an asylum seeker shall not be a Namibian citizen by birth as envisaged in Article 4(1)(d) of the Namibian Constitution.'

[43] When considering whether or not to grant a declaratory relief, the court is required to conduct a two-fold enquiry, namely:

- (a) whether the court is satisfied that the applicant is a person interested in an existing, future or contingent right or obligation, and if so,
- (b) whether the court considers it appropriate to grant the declaratory relief in the circumstances of the case.²

[44] In the present matter, the respondent is the Minister of Home Affairs, Immigration, Safety and Security, responsible for the administration and implementation of the Refugees Act, Immigration Control Act 7 of 1993 as well as the Namibian Citizenship Act 14 of 1990. Having had regard to the contents of the

² *Southern Engineering and Another v Council of the Municipality of Windhoek* SA 14/2009 delivered on 7 April 2011 at para 48.

aforegoing legislation, I am satisfied that the respondent has met the first requirement referred to above.

[45] In regard to the second leg of the enquiry, I am of the view that it is appropriate to grant the relief sought. However, I do not consider it necessary to couch the declaratory relief in the same terms as it is put in the Notice of Motion. I am of the view that the appropriate declaratory relief should be phrased to the effect that: parents who are in Namibia awaiting the outcome of their application for refugee status and who, at the time of the birth of their child, have not obtained refugee status, are not 'ordinarily resident' in Namibia, for the purposes of art 4(1)(d) of the Constitution. I shall therefore, grant such relief.

[46] Due to the conclusion I have reached that the applicant did not acquire Namibian citizenship by birth, I am of the view that the respondent is entitled to the relief setting aside the decision to issue the applicant a full birth certificate and revoking such certificate and the national identification card issued pursuant thereto.

[47] In conclusion, and for the foregoing reasons, I am of the view that the applicant's application stands to be dismissed and the counter application stands to be granted.

[48] As regards the issue of costs, there is no reason for the costs not to follow the event. I shall therefore, grant costs in favour of the respondent. Furthermore, I am satisfied that the respondent is entitled to costs including costs of one instructing and two instructed counsel.

[49] In the result, I make the following order:

1. The applicant's application is dismissed.
2. It is declared that parents who are in Namibia awaiting the outcome of their application for refugee status and who, at the time of the birth of their child have not obtained refugee status, are not 'ordinarily resident' in Namibia for the purposes of art 4(1) (d) of the Constitution.
3. The decision to issue the applicant a full birth certificate on 28 May 2002 is hereby reviewed and set aside and the full birth certificate and

the national identification card issued pursuant thereto are hereby revoked.

4. The applicant is ordered to pay the costs of the respondent occasioned by the application and the counter application, such costs to include costs of one instructing and two instructed counsel.
5. The matter is removed from the roll and is regarded finalised.

B USIKU
Judge

APPEARANCES

APPLICANT: J Diedericks (with him FB Bangamwabo)
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RESPONDENT: LC Botes (with him LNK Ihalwa)
Of Office of the Government Attorney, Windhoek